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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 754

FAMILY FAIR, INC. and BERTON KAPLAN,

Appellants,

vs.

THE STATE OF OHIO,

Appellee.

On Appeal From The Final Order Of The Supreme Court Of The State Of Ohio, Dismissing An Appeal Of The Judgment Of The Court Of Appeals For Lucas County, State Of Ohio, Affirming The Conviction Of The Appellants.

[PURSUANT TO 28 U. S. C. SECTION 1257 (2)]

JURISDICTIONAL STATEMENT

J. H. NATHANSON,
DAVID A. KATZ,
728 National Bank Building,
Toledo 4, Ohio,
Attorneys for Appellants.

SPENGLER, NATHANSON, HEYMAN, MCCARTHY & DURFEE,
Of Counsel

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JURISDICTIONAL STATEMENT

INTRODUCTION

Attorneys for the above-named Appellants submit this Jurisdictional Statement and respectfully request that it be filed in both of the above-captioned cases. In the courts below, the cases were tried together, and briefs and arguments on appeal were filed and heard together. However, two separate Notices of Appeal to this Court were filed in the Supreme Court of Ohio on December 31, 1960.

In the Courts below the parties were charged, and convicted, with violating the same Ohio statute. Entries of conviction and affirmance were identical in all lower Courts, save for the captions. The individual Appellant, Berton Kaplan, was the alleged manager of the corporate appellant, Family Fair, Inc. For purposes of this brief, only the case of Appellant Family Fair, Inc. will be discussed, the issues in both cases being the same, and the entries made in the lower Courts in Berton Kaplan's case being the same as those attached in the Appendix hereto.

It is, therefore, respectfully requested that this Jurisdictional Statement be filed in both cases before this Court.

A. OPINIONS DELIVERED IN THE COURTS BELOW.

None of the courts below delivered opinions, either written or oral. The Journal Entry of conviction prepared by the Municipal Court of the City of Toledo, State of Ohio, is unreported and is attached hereto and made a part of this Jurisdictional Statement as Appendix A. Such conviction was affirmed by the Court of Appeals for Lucas County, State of Ohio, in an unreported decision. The Journal Entry of that Court is attached to and incorporated in this Jurisdictional Statement as Appendix B. The Supreme Court of the State of Ohio, by a decision dated October 19, 1960, dismissed an appeal from the decision of the Court of Appeals of Lucas County, State of Ohio, for the reason that no debatable constitutional issue was involved. This decision is reported at 171 Ohio St. 322. This is a final order of the highest court of the State of Ohio, and is attached to and incorporated in this Jurisdictional Statement as Appendix C. Contemporaneous with the dismissal of Appellant's appeal, the Supreme Court of Ohio overruled Appellant's

"Motion for an Order Directing the Court of Appeals of Lucas County to Certify Its Record." (Appendix D.)

B. *STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.*

Appellant was convicted by the Municipal Court of the City of Toledo, Ohio, for violation of Ohio Revised Code, Section 3773.24, hereinafter sometimes referred to as the Ohio Sunday Closing Law. The Appellant seeks review of this conviction, which was affirmed by the judgment of the Court of Appeals for Lucas County, Ohio, on June 2, 1960; and which decision was sustained by a final order of the Supreme Court of Ohio on October 19, 1960, when it dismissed an appeal as of right and overruled a Motion for an order directing said Court of Appeals to certify its record.

The jurisdiction of this Court is invoked under and by virtue of 28 U.S.C. Section 1257 (2), the appeal being from a decision "where there was drawn in question the validity of a statute of a State on the ground that it is repugnant to the constitution of the United States and the decision was in favor of its validity." *Everson v. Board of Education*, 330 U.S. 1 (1947), *Winters v. New York*, 333 U.S. 507 (1948); *McGowan v. Maryland*, Supreme Court of the United States, October Term, 1960, No. 8.

The Notice of Appeal to this Court was filed in the Supreme Court of Ohio on December 31, 1960, with required certification of service upon Appellee.

C. *STATUTE AND CRIMINAL PENALTIES INVOLVED.*

Ohio Revised Code Section 3773.24, as amended by the Ohio Legislature on July 17, 1959, is set forth in full as follows:

Transaction of business on Sunday; exceptions.

No person, firm, or corporation shall engage in common labor or suffer or permit a building or place to be open for transaction of business, or require a person in his employ or under his control to engage in common labor or to open a building or place for the transaction of business on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.

This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.

This Section shall not apply to:

(A) Traveling or the providing of services and commodities incidental thereto;

(B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;

(C) Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto;

(D) The operation of publicly owned places of entertainment, recreation, or education, by a public officer, concessionaire, exhibitor, or employees of all or any of them, or any other person, or the providing of services and commodities incidental thereto."

The penalty involved is by directive in Ohio Revised Code Section 3773.99 (Q):

"Whoever violates section 3773.24 of the Revised Code shall be fined twenty-five dollars for a first offense; for each subsequent offense such person shall be fined not less than fifty nor more than one hundred dollars and imprisoned not less than five nor more than thirty days."

D. *QUESTIONS PRESENTED.*

The following questions are presented by this appeal:

(1) Is the state statute in question, to wit, Section 3773.24, Ohio Revised Code, unreasonably discriminatory and/or does it contain unreasonable classifications, in violation of the due process and/or equal protection clauses of the Fourteenth Amendment to the United States Constitution, the enforcement of such statute thereby depriving Appellant of a property right without due process of law and in violation of its right to equal protection of the laws?

(2) Does Section 3773.24, Ohio Revised Code, and the enforcement thereof fail to bear a reasonable relationship to the health, safety and welfare of the people of the State of Ohio, in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States of America?

(3) Is the state statute in question, to wit, Section 3773.24, Ohio Revised Code, violative to the religious freedom guarantees of the First Amendment to the United States Constitution, as applied to the states by virtue of the operation of the Fourteenth Amendment to said Constitution, the conviction of the Appellant thereby depriving it, its officers and its employees of the protection of said First Amendment?

(4) Does Section 3773.24, Ohio Revised Code, and the enforcement thereof, violate requirements of the First and Fourteenth Amendments to the Constitution of the United States pertaining to the establish-

ment of and free exercise of religion, due process of law and equal protection of the laws, in that said section prefers certain religions and operates to the disadvantage of and in discrimination against people of different religious beliefs?

E. *STATEMENT OF THE CASE.*

Appellant was charged with violation of Section 3773.24 of the Ohio Revised Code, as amended. The affidavits filed in the trial court, the Municipal Court of the City of Toledo, Ohio, charged that one "Family Fair, Inc., a corporation, did intentionally and with knowledge, unlawfully suffer or permit a building or place known as Family Fair, Inc., Bancroft and Auburn Streets, to be open for the transaction of business, the aforesaid day being Sunday. For the second count, that on the 24th day of January, 1960, *** did intentionally and with knowledge, unlawfully require a person in its employ or under its control, to open a building for the transaction of business *** the aforesaid day being a Sunday. For the third count, that on the 24th day of January, 1960, *** did intentionally and with knowledge, unlawfully require a person, Dick Portman, in its employ or under its control, to engage in common labor on Sunday at a building or place known as Family Fair, Inc. * * *."

Appellant immediately filed written Motion to Dismiss the action on the grounds that the statute involved violated the First and Fourteenth Amendments to the Constitution of the United States. (See record from Court of Appeals, Lucas County, Ohio.) This motion, and similar motions on identical grounds made throughout the course of trial, were overruled by the Trial Court. (See Bill of Exceptions, Pages 2-3 and 25-26.) Upon trial, Appellant was found guilty and fine was imposed. (Appendix A.)

The Appellant, subsequent to the overruling of a Motion for New Trial by the Trial Court, perfected its appeal to the Court of Appeals for Lucas County, Ohio. Issues presented before the latter Court included the constitutionality of the statute when viewed in light of the First and Fourteenth Amendments to the United States Constitution. After submission of briefs and oral argument, that Court, on June 2, 1960, affirmed the conviction in the Trial Court, without opinion. (Appendix B.)

The Appellant then filed its Notice of Appeal as of right and Motion to Certify the Record to the Supreme Court of Ohio, together with a Brief and Assignments of Error, which again raised the issue of the validity of Section 3773.24, Ohio Revised Code, under the First and Fourteenth Amendments to the Constitution of the United States. On October 19, 1960, after oral argument, the Supreme Court of Ohio dismissed the appeal and overruled the motion to certify the record. (Appendix C.)

The store operated by Family Fair, Inc., known as "Family Fair," is a large retail department store located outside the "downtown core area" in the City of Toledo, Ohio. The store is located on a main thoroughfare approximately three (3) miles from the downtown shopping area. It is of the type generally described as a "discount" operation, with a selling area of approximately 100,000 square feet. Family Fair is in direct competition with retail stores in the commercial areas of Toledo and the Greater Toledo trading area. A major number of their customers are from small towns outside Toledo, who find it convenient to shop on Sunday.

Sunday prohibition statutes have been in effect in Ohio for over 100 years. The present section here in question evolved from Ohio Revised Statutes, Section 7033, and more

recently from Ohio General Code, Sections 13044, 13045 and 13046, contained in Chapter 13, entitled "Sabbath Desecration." When the Revised Code was adopted in Ohio in 1953, the latter three sections were combined in Section 3773.24:

> "Laboring or requiring employee to labor on Sunday. No person who is over fourteen years of age shall engage in common labor or open or cause to be opened, a building or place for transaction of business, or require a person in his employ or under his control to engage in common labor on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.
>
> This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.
>
> This section does not prevent emigrating families from traveling, watermen from landing their passengers, or keepers of toll bridges, toll gates, or ferries from attending them on Sunday."

The Supreme Court of Ohio decided that the last quoted section met all necessary constitutional requirements. *State v. Kidd*, 167 Ohio St. 521, 150 N.E. (2d) 413 (1958).

Effective July 17, 1959, the subject section was amended as set forth in Paragraph C hereof. Substantial alterations were made in the exemptions, exclusions and classifications contained in the section. It is Appellant's contention, rejected by the Ohio Supreme Court, that "Sunday Closing type" legislation is, per se, unconstitutional, and that the specific statute here in question is unconstitutional when viewed in light of the tests of constitutionality dictated by

the First and Fourteenth Amendments to the Constitution of the United States.

F. THE FEDERAL QUESTIONS ARE SUBSTANTIAL, WERE WRONGLY DECIDED BELOW, AND ARE OF GREAT PUBLIC IMPORTANCE.

1. THE ISSUES INVOLVED ARE FUNDAMENTAL, WITH GREAT GENERAL PUBLIC AND SUBSTANTIAL FEDERAL CONSTITUTIONAL IMPACT.

In the current economy of this country there can be little doubt that Sunday Closing Laws materially affect vast segments of the population. There is a current national controversy regarding Sunday operations, particularly of retail stores similar in nature to Appellant's operation. This controversy has been generated by clashes of an economic nature between downtown and suburban stores. This court is well aware of this conflict, which has become pronounced since the end of World War II, and is keyed to the marked population growth in suburban areas surrounding our cities. This de-centralization of shopping areas has been accompanied by intense competition between stores located in the downtown business core area and those located in suburban areas. The latter have found that considerable segments of society are interested in and actually shop on Sunday. The resulting growth in suburban Sunday shopping has thus caused alleged economic detriment to the downtown stores.

To combat this alleged "unfair economic advantage" the downtown store owners invoke the aid of local and state "Blue Laws." Thus, statutes which have originally been designed, *by court interpretation*, to insure a "day of rest" for the populace, become weapons in an economic war, with an ever-increasing impact on society.

Against this background and in this context, the conviction here in question was obtained. Not only is the validity of the existent Ohio statute questioned, but the validity of Sunday Closing Legislation in all respects is challenged. Evidence of the substantial nature of the federal questions involved in Sunday Closing legislation is the fact that this court has docketed several similar cases. (*Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, October Term 1960, Dkt. No. 11; *McGowan v. Maryland*, October Term 1960, Dkt. No. 8; *Braunfeld, et al. v. Brown, et al.*, October Term 1960, Dkt. No. 67; *Two Guys From Harrison - Allentown, Inc. v. McGinley, et al.*, October Term 1960, Dkt. No. 36; and *Bargaintown, U.S.A., Inc. v. Whitman*, October Term 1960, Dkt. No. 76.)

The above-cited cases and the current nation-wide controversy surrounding Sunday Closing Laws are evidence that the questions presented in Paragraph D hereof are substantial and require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Against this background of a general nature, Appellant proceeds to discuss the Federal Constitutional questions raised by this appeal.

2. *THE OHIO SUNDAY CLOSING LAW AND THE ENFORCEMENT THEREOF VIOLATES THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW.*

a) The Statute Operates To Deprive This Appellant and Others of Valuable Property Rights.

There can be little question that, if the statute violates constitutional guarantees of due process, Appellant is deprived of valuable property rights in violation of the

Fourteenth Amendment. Deprivation of the right to operate its business on Sundays takes from Appellant the opportunity to pursue economic gain on that day. It also deprives Appellant of the right to engage in competition for customers with other types of businesses which are permitted to operate on Sunday and which sell goods of the same or similar nature as offered by Appellant. The statute also prohibits customers from shopping on the only day which many families have to shop together, or, in some instances, to shop at all.

The foregoing briefly illustrates the nature of the property right taken from Appellant and others by the operation and enforcement of the challenged statute.

b) The Statute Here Questioned Bears No Reasonable and Substantial Relation To The Health, Safety and Welfare of the Public.

In order to withstand attack based upon violation of Fourteenth Amendment Due Process, this statute must bear a reasonable or substantial nexus with the permitted ends sought to be accomplished. (*Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 397; *Tyson & Bros. v. Banton*, 273 U.S. 418; *Cincinnati v. Correll*, 141 Ohio St. 535,49 N.E. (2d) 412.) Numerous cases decided by this Court could be cited for this proposition, but the principals, as enunciated by this Court, are clear.

The professed purpose of the subject statute is the creation of a "uniform day of rest." (*State v. Kidd, supra.*) The declaration that this is the objective of the section, it is submitted, is an *ad hoc* improvisation of the Ohio courts to attempt to preclude attack based upon the religious freedom guarantees of the First Amendment. While one day of rest in seven may be a desirable and permitted legisla-

tive objective, a uniform day of rest cannot be so characterized. This completely ignores the number of hours worked the other six days of the week, unlike child labor laws *and* other maximum hours type legislation, which are enforced in Ohio. It is possible, under the Ohio Sunday Closing Law, to work six days in any area of labor, and work on Sunday in an area exempted from prohibition of the statute. This, then, bears no reasonable relation to the health, safety, morals or general welfare of the public. The complex society in which we live demands that newspapers, steel mills, glass producers, automobile factories, retail stores, and other business enterprises remain operational on Sunday. Although not exempted under Ohio law, the first four activities mentioned above do remain open on Sunday, without opposition of enforcement officials. Evidence of the arbitrary and unreasonable character and operation of the statute is the myriad exempted occupational areas, "and the providing of services and commodities incidental thereto." Few, if any, areas of the economy have been closed by enforcement of the statute, except retail stores. The Ohio Sunday Closing Law is arbitrary, capricious and completely lacking in requisite valid legislative purpose.

The most appropriate summarization of the objections set forth in this subsection is the following by Judge Magruder:

> "* * * the objection is well taken that, in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires * * * [Appellant] to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plain

tiffs of liberty, without due process of law, contrary to the Fourteenth Amendment." (*Crown Kosher Supermarket of Mass. v. Gallagher*, 176 F. Supp. 466,475 D.C. Mass. 1959.)

3. *THE OHIO SUNDAY CLOSING LAW DENIES THIS APPELLANT AND OTHERS EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.*

a) The Legislature Has The Right To Classify Within Constitutionally Defined Limits.

Within the limits of the police power, State legislatures may classify. *Goesaert v. Cleary*, 345 U.S. 464; *Morey v. Doud*, 354 U.S. 454. But such classification is invalid if unreasonably discriminatory or if the classifications contained in the subject legislation are arbitrary, capricious or unreasonable in light of the ends sought to be accomplished. *Quaker City Cab Co. v. Pennsylvania, supra.*

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense, *** it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner v. Oklahoma*, 316 U.S. 535,541.

This court has never defined the concept of equal protection more accurately than in *Quaker City Cab Co. v. Pennsylvania, supra*:

> "The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, but it does require that the classification be not arbitrary but based on a real and substantial

difference having a reasonable relation to the subject of the particular legislation. *Power Mg. Co. v. Saunders*, 274, U.S. 490,71 L. Ed. 1165,47 Sup. Ct. Rep. 678." (At page 400.)

Again from page 401 of the same case:

"But the practical operation of the section is to be regarded, and it is to be dealt with according to its affect." (Cases cited.)

To sustain this statute over objections of the equal protection clause of the Fourteenth Amendment, there must be qualitative differences in the classifications which demonstrate a reasonable nexus with the constitutionally permitted ends. As stated above, while classification, even some discrimination, is permitted, such classification may be only within the structural framework of the permitted objectives of the statute — here, a uniform day of rest. Distinctions which make little sense in terms of this framework violate equal protection of laws and due process. The statute here in question cannot withstand a close analysis in light of these established constitutional concepts.

b) The Classification Made By The Legislature of The State of Ohio Is Not Based Upon Qualitative Differences and Is Arbitrary and Capricious.

The questioned statute must be considered in light of the foregoing constitutional concepts. When the section was amended in 1959, the four broad categories of exceptions heretofore set forth were added. These exceptions are so broad in scope as to nullify the effectiveness of the statute, except as to limited commercial areas, thus benefitting only a small segment of the citizenry to the economic detriment

of those required to close on Sunday. It is submitted that these exceptions, or exemptions, are arbitrary and bear little relation to the avowed purpose of the statute. If the desired end is to insure a uniform day of rest for all citizens of Ohio, the exemption of these thousands of laborers bears no nexus with this end. Those permitted to work on Sunday are no less in need of a day of rest than those prohibited from doing so. The test cannot be related to its importance to the community, for it can hardly be said that it is more important to sell gasoline, tires, etc., than food or clothing, which have been held non-exempt categories.

While Appellant is prohibited from opening its doors, those in direct competition with it may do so. For example, Appellant offers for sale automobile parts and accessories, sporting goods, toys, tooth paste, prepared drugs and other miscellaneous items. Under Paragraph A of the statute, a gasoline station may sell tires and automobile accessories on Sunday, but not Appellant. Under Paragraph B a sporting goods store may open, in direct competition with Appellant. The persons operating these businesses apparently need no "day of rest," but Appellant's employees are required by statute to remain away from the store on Sunday; *not required to rest*, just prohibited from working at Appellant's store on Sunday. The foregoing illustrates the grant of a special privilege to the exempted classes, while without legal excuse denying such privilege to others.

Appellant further contends that the statutory language appended to each subsection of the statute — *"and the providing of services and commodities incidental thereto"* — is so nebulous, arbitrary and unreasonable as to be without clear definition, thus violating the due process and equal protection clauses of the Fourteenth Amendment. The breadth of such language makes the section a closing law aimed at certain classes of businesses with a general exception to other classes.

The selection of businesses which are permitted to remain open on Sunday and those required to close, is not based upon reasonable differences, but is arbitrary and capricious. It is not coincidental that only retail stores have been sought out; this is clearly a discriminatory economic sanction. By arbitrarily requiring Appellant to close its store on Sundays, in furtherance of no legitimate interest which the state is permitted to safeguard, the statute has caused Appellant to lose potential sales. There is no reasonable connection between the ends sought to be achieved and the statutory means instituted. The classification created by the legislature is arbitrary, capricious and unreasonable and, as applied to this Appellant violates rights granted by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. *THE OHIO SUNDAY CLOSING LAW AND THE ENFORCEMENT THEREOF VIOLATES THE CONSTITUTIONAL PROHIBITION RESPECTING ESTABLISHMENT OF RELIGION.*

a) The Ohio Sunday Closing Law Constitutes A Violation of Legislative Neutrality In Religious Matters.

Separation of Church and State is one of the basic constitutional precepts in our governmental composition. That such edict applies to the State as well as Federal government is no longer open to question. *Cantwell v. Connecticut*, 310 U.S. 296; *Murdock v. Pennsylvania*, 319 U.S. 105; *Marsh v. Alabama*, 326 U.S. 501; *Everson v. Board of Education*, 330 U.S. 1. In the *Everson* and *Murdock* cases this Court spelled out the meaning of the no-establishment clause of the First Amendment, as applied to the States through the operation of the Fourteenth Amendment:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, *or* prefer one religion over another; *neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess a belief or disbelief in any religion."

"*Neither a state nor the Federal Government can openly or secretly participate in the affairs of any religious organization or groups and vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' *Reynolds vs. United States*, 1878, 98 U.S. 145 at page 164, 25 L. Ed. 244." (Emphasis added).

It is to be noted that the admonitions contained in the above-quoted edict are framed in the alternative, and impose upon government an obligation of *neutrality*, not merely as between various sects and faiths, but also as between religion and non-religion. The First Amendment bars all governmental intervention in religious affairs. Based upon the historical background of the statute and the effect of its current operation, there can be no doubt that the Ohio Sunday Closing Law violates this position of neutrality.

The current version of the Ohio statute questioned here evolved from Ohio Revised Statute 7032 (a) and Ohio General Code, Sections 10344, 10345 and 10346. These sections owed their existence to the Northwest Ordinance. 1 *Laws of Northwest Territory*, 27. These sections were, until 1953, embraced within that portion of the Ohio General Code labeled as the "Sabbath Desecration" chapter. Their evolution and operation are incontrovertibly religious.

Sunday is a Christian day of worship. This statute aims to prevent secularization of the Christian Sabbath. The statute, by depriving non-worshippers of their right to pursue economic gain, protects those business men who desire to close their doors on Sunday in order to worship. The merits of Sunday worship are not here in question. Rather, the question becomes the role of the State in influencing or protecting such worship. Such action is not a proper function of government.

The Ohio Sunday Closing Law puts the State of Ohio in a position of forcing non-Christians or non-worshippers to show respect for and to honor the Resurrection and the doctrine of the Divinity of Christ. The expression of such position was recently made by Judge Alexander in a Pennsylvania case involving that state's Sunday Blue Law:

> "There is in the record of this case, for the first time in any case I have found, explicit and uncontradicted testimony by expert witnesses that Sunday is the Lord's Day among Christians, that it commemorates the Resurrection of Jesus just as does Easter, that to accept Sunday as a holy day is to accept the Divinity of Jesus, that to be compelled by law to refrain from work on Sunday is to be compelled by law to show respect for and to honor the Resurrection and the doctrine of the Divinity of Jesus.
>
> "Refraining from work, under compulsion of law, is a compulsory form or symbol of respect, like kneeling or standing or covering or uncovering the head. This is offensive, according to the expert witnesses, to Seventh Day Christian Sabbatarians and to Jews, and I believe to persons of religious faiths other than the Christians, to atheists, agnostics and even to those devout Christians who feel that religion is a matter for one's own conscience, uncoerced by any secular authority." *Commonwealth of Pennsylvania v. Cavalero*, U.S.L. Week 2551 (1960).

Sunday observance is not only recognition of the divinity of Christ, but it is a form of compulsory religious observance. Compulsory abstention from work without regard to periods of rest provided by other statutes, union contracts, and individual decision is enforcement of a religious Sabbath. Even though a person does not choose to worship, his enforced idleness is a symbol of religious observance. Such a symbol, imposed by the State of Ohio, is, like the flag salute, an improper extension of legislative authority into areas in which governmental control is prohibited by the First and Fourteenth Amendments to the Constitution of the United States. *West Virginia v. Board of Education*, 319 U.S. 624 (1943).

b) The Exemption For Sabbatarians Under The Ohio Statute Evidences The Religious Nature Of The Law.

The Ohio law, unlike the Pennsylvania law, provides an exemption for those "*who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.*" This exemption raises several substantial issues. Its presence in the statute is evidence of the religious purpose of the law. The exemption utilizes as the test not *rest* on another day, but *conscientious worship* on Saturday. Such test is conclusive rebuttal of the characterization of the statute as a "day of rest" law and evidence of its religious purpose.

The exemption does not provide for those who may observe a day other than Saturday or Sunday as the Sabbath, such as Moslems, nor those who do not desire to observe *any* day as the sabbath. The result is discrimination against these minority groups.

The Ohio Sunday Closing Law thus demands applica-

tion of a religious test to determine qualification for exemption. Enforcement officials must determine whether a citizen "conscientiously observes" Saturday as the sabbath. Such a test defies the mandate of the First Amendment to the United States Constitution.

c) The Ohio Sunday Closing Law Cannot Be Justified As An Enactment The Purpose of Which Is To Combat A Clear And Present Danger.

Once there is established characterization of this statute as a religious law, the usual presumption of constitutionality of legislation must be balanced with "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 530; *Marsh v. Alabama, supra; Prince v. Massachusetts*, 321 U.S. 158-164. Any attempt to restrict these liberties must be justified by *clear, public interest, threatened not doubtfully or remotely, but by "clear and present danger." Thomas v. Collins, supra.*

It is not sufficient to establish that a clear and immediate danger exists. It must be established with equal clarity that the restriction imposed upon the rights guaranteed by the First Amendment through the operation of the Fourteenth Amendment, is necessary to meet the clear and immediate danger which exists. Ordinarily, if a situation exists requiring legislative action, it is for the Legislature and the courts may not interfere unless the Legislature's act was patently unreasonable. *United States vs. Carolene Products*, 304 U.S. 144. But for legislation abridging a liberty secured by the First Amendment, a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas vs. Collins*,

supra., at page 530. "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill vs. Alabama*, 310 U. S. 88, 95-96.

Measured by these standards, the Ohio Sunday Closing Law cannot stand as enforced against the Appellant. The dangers which it purportedly seeks to avert are (1) the hazard to health resulting from uninterrupted labor, and (2) the prevention of interference with basic religious character of the day. But if practicable means exist to avert those dangers without infringing upon religious freedom, the First Amendment imposes upon the State of Ohio an obligation to avail itself of those means. The evils against which the statute here in issue are purportedly aimed can readily be averted without restricting the religious liberty of the defendants herein and of all other persons in Ohio. As to the health hazard, two simple methods are available: Either a simple one day rest in seven statute applicable to all persons, as is embodied in the Child Labor and Female Labor statutes, or a provision in the Sunday law itself exempting from its operation those who rest on any other day, regardless of their religious beliefs.

It is therefore submitted that the evil which the Ohio statute purportedly seeks to avert can be practicably avoided without infringing upon the religious liberty of the people of this State. As now constituted, the many exceptions in the statute and this Court's probable interpretation thereof, make the statute inappropriate for the purpose of protecting the health and welfare of the citizenry of the State of Ohio for the reasons professed. This Court should re-examine its previous decision in refusing to

admit on the merits the *Kidd* case, *supra*, which case held that the predecessor statute to this law is not a religious law; but is merely a health and welfare measure. It is respectfully submitted that the better reasoning is that followed by Judge Magruder in the *Crown Kosher Super Market, Inc.* case, *supra*.

Even though the purported ends with which this statute has ostensibly been enacted to deal are permissible subjects of legislation, constitutionally, since the *actual objective* of the statute is an unpermitted subject of legislation, the statute itself must fall before the onslaught of the First and Fourteenth Amendments to the Federal Constitution.

CONCLUSION

The Ohio Sunday Closing Law raises several substantial, federal constitutional issues. These issues involve the due process and equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States. Appellant contends that the statute bears no reasonable relation to the health, safety or welfare of the public, and contains classification not based on real and substantial differences, thus depriving Appellant of a property right without due process of law and in violation of its right to equal protection of the laws. The Ohio statute is, in addition, violative of the religious neutrality mandate of the First Amendment.

The statute here questioned differs from those involved in cases admitted from other states. The Ohio Sunday Closing Law contains an exemption for those who conscientiously observe the seventh day as the sabbath. Twenty other states similarly provide a sabbatarian exemption. In order to determine the effect of such an exemption, it

is respectfully submitted that this Court should hear this case in conjunction with those cases previously placed on its docket. (Noted in Paragraph F, (1) hereof.)

In view of the previous action of this Court in noting probable jurisdiction and assigning for hearing several cases which raise constitutional issues similar to those presented by this appeal, it is respectfully submitted that this Court should note probable jurisdiction in this matter and set this case for hearing.

Respectfully submitted,

J. H. Nathanson
David A. Katz
728 National Bank Building
Toledo 4, Ohio
Attorneys for Appellant.

SPENGLER, NATHANSON, HEYMAN,
McCARTHY & DURFEE
728 National Bank Building
Toledo 4, Ohio
Of Counsel.

APPENDIX A

TOLEDO MUNICIPAL COURT — CRIMINAL BRANCH

Entry of March 8, 1960 — Defendant found Guilty. Statutory time for Motion for New Trial granted. (3-14-60)

F. W. Wiley, Judge.

Entry of March 29, 1960 — On consideration of Motion for New Trial, the Court finds same not well taken and same is hereby overruled. Defendant sentenced to pay a fine of $25.00 and costs taxed at $20.05 herein.

F. W. Wiley, Judge.

APPENDIX B

IN THE COURT OF APPEALS,
LUCAS COUNTY, OHIO

JOURNAL ENTRY

The Court, after oral hearing, being fully advised in the premises, and on due consideration, finds no prejudicial error in the judgment of the Municipal Court of the City of Toledo; and

HEREBY, affirms said judgment and remands the said cause to such Court, for execution of its sentence.

APPENDIX C

Final Order of the Supreme Court of Ohio. (October 19, 1960)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $

ORDERED, That a special mandate be sent the Municipal Court of the City of Toledo, Ohio, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Lucas County, "for entry."

APPENDIX D

Ruling by Supreme Court of Ohio on Motion To Certify The Record of the Court of Appeals, Lucas County, Ohio. (October 19, 1960)

It is ordered by the Court that this Motion be, and the same hereby is, overruled.

E COPY

FILED
MAR 21 1961
JAMES R. BROWNING, Clerk

No. 754

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

On Appeal from the Supreme Court of Ohio.

FAMILY FAIR, INC. AND BERTON KAPLAN,
Appellants,

vs.

STATE OF OHIO,
Appellee.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

A. SMITH
O, OHIO

LOUIS R. YOUNG,
Director of Law,
FRANK T. PIZZA,
Assistant Director of Law,
Department of Law,
327 Safety Building, Toledo, Ohio,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 754

FAMILY FAIR, INC. AND BERTON KAPLAN,
Appellants,

vs.

STATE OF OHIO,
Appellee.

MOTION TO DISMISS APPEAL

The State of Ohio, appellee in the above entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss this appeal on the grounds that it does not present a substantial federal question and the judgment of the Supreme Court of Ohio rests on an adequate non-federal basis.

LOUIS R. YOUNG,
Director of Law.
FRANK T. PIZZA,
Assistant Director of Law,
Department of Law,
City of Toledo, Ohio,
Attorneys for Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This motion is directed to the appeals and jurisdictional statement filed heretofore by the appellants, and it is requested that it be filed in both of the above entitled cases.

QUESTIONS PRESENTED

The following questions are presented by this motion:

1. The Ohio statute in question, Section 3773.24 Revised Code, is a proper exercise of the police power of the Ohio General Assembly preserving the health and welfare of the people of this state, and makes a classification of pursuits which is not violative of the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. The Ohio statute in question Section 3773.24 Revised Code, is not violative of the First and Fourteenth Amendments to the Constitution of the United States as an infringement upon the religious freedom of the people of this state, nor does it constitute the establishment of any religion or cause any discrimination between persons of different religious beliefs.

STATEMENT OF THE CASE

This case is an appeal from a judgment of the Supreme Court of Ohio, dismissing an appeal as of right for the reason no debatable constitutional question was involved in the case. The appellants upon trial in the Municipal Court of Toledo, Ohio were found guilty of a violation of Section 3773.24 Revised Code and judgment entered against them. This judgment was affirmed on an appeal to the Court of Appeals of Lucas County, Ohio. The appellant, Family Fair, Inc., operates a retail establishment located in the City of Toledo, Ohio and on the Sunday in question the evidence adduced established that the premises operated by the appellant was engaged in the transaction of a retail business. The appellant, Berton Kaplan, was the manager of the premises on the Sunday in question.

ARGUMENT

I

The Ohio Statute in Question, Section 3773.24 Revised Code, is a Proper Exercise of the Police Power of the Ohio General Assembly Preserving the Health and Welfare of the People of this State, and Makes a Classification of Pursuits Which is not Violative of the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Ohio has consistently held that the General Assembly of Ohio has the constitutional authority to enact legislation in the exercise of its police power to regulate or prohibit commercial activity or labor on Sunday in the interest of the preservation of the health, safety and welfare of the people of this State. The Supreme Court of Ohio has predicated this conclusion upon the reason that the policy of such Sunday legislation is established by the observed fact, derived from long experience and the custom of all nations, that periods of rest from ordinary pursuits are requisite to the well-being, morally and physically, of the citizens of this state and any people. *State of Ohio v. Kidd*, 167 Ohio St. 521, Appeal to the Supreme Court of the United States dismissed, no substantial federal question, 358 U. S. 131, *State of Ohio v. Powell*, 58 Ohio St. 324, *Bloom v. Richards*, 2 Ohio St. 387. See also *Soon Hing v. Crowley*, 113 U. S. 703, 705; *Hennington v. Georgia*, 163 U. S. 299; *Petit v. Minnesota*, 177 U. S. 164.

The purpose of Section 3773.24 Revised Code is not to protect one business from another, or to provide or protect any competitive advantage of any person or concern en-

gaged in a particular type of business, it is rather the purpose of the statute to protect the individual employee and preserve for him a much needed day of rest and recreation. Without the protection of law, the individual employee falls victim of his economic status and will ultimately be required to give up his day of rest to meet the competition of those who seek economic advantage by working on a day which traditionally has been observed as a day of rest and recreation, serving the best interests of the people and business in general.

Section 3773.24 Revised Code as now effective, has a further purpose to make lawful on Sunday certain specific types of business or commercial activities which are recreational and educational in character, so that the people of this state might lawfully enjoy the full benefits of a day of rest. In this respect, the statute excepts from its regulation, recreation, sports, amusements, entertainment or exhibits, and the providing of services incidental to these activities. In the absence of specific statutory authority it has been previously held that sport or amusement is lawful. *Ex parte Neet*, 157 Mo. 527; *Territory v. Davenport*, 17 N. M. 214, 124 P. 795. The statute also excepts public and private fairs, and publicly owned places of entertainment, recreation and education, and the providing of services and commodities incidental to these activities. A further exception is provided for travelling and services and commodities incidental thereto, which recognizes the present mobility of our society and the necessity of transportation for the full utilization of Sunday. *Nagle v. Brown*, 37 Ohio St. 7. In the context of the prohibited commercial activity contained in the statute, all of these exceptions per force relate to commercial activities of this special character, all of which constitutes a reasonable classification. *McGowan v. State of Maryland*, 220 Md.

117, 151 Atl. 2d 156, Supreme Court of the United States, October Term, 1960, No. 8; *State of Connecticut v. Hurliman*, 143 Conn. 502, 123 Atl. 2d 767; *State of Connecticut v. Shuster*, 145 Conn. 554, 145 Atl. 2d 196; *People of New York v. Freedman*, 302 N. Y. 75, 96 N.E. 2d 184, Appeal to United States Supreme Court dismissed, no substantial federal question, 341 U. S. 907; *State of North Carolina v. McGee*, 327 N. C. 63, 75 S. E. 2d 783; *Two Guys From Harrison, Inc. v. Furman*, 58 N. J. Super 313, 156 Atl. 2d 56; *Carr v. State*, 175 Ind. 241, 93 N.E. 1071.

The creation of these exceptions to the general prohibition in the statute will require that a limited number of persons must work on Sundays, but such employment is in furtherance of the general welfare of the people of the state so as to fully utilize the day as one of rest and recreation. The exceptions delineate separate classes of commercial activity and contain no internal discrimination which would constitute a violation of the equal protection clause of the Fourteenth Amendment.

II

The Ohio Statute in Question Section 3773.24 Revised Code, is not Violative of the First and Fourteenth Amendments to the Constitution of the United States as an Infringement Upon the Religious Freedom of the People of this State, nor Does it Constitute the Establishment of any Religion or Cause any Discrimination Between Persons of Different Religious Beliefs.

The Supreme Court of Ohio has consistently held that Section 3773.24 Revised Code, and its predecessor statutes are predicated upon the proven fact that a day of rest from ordinary pursuits is requisite for the well-being, both morally and physically, of the people of this state and

that the statute in no way interferes with the freedom of religious worship or the free exercise of religious beliefs, nor was it designed to. *State of Ohio v. Kidd*, 167 Ohio St. 521, Appeal to United States Supreme Court dismissed, no substantial federal question, 358 U. S. 131; *State of Ohio v. Powell*, 58 Ohio St. 324; *Bloom v. Richards*, 2 Ohio St. 387. Certainly the Supreme Court of the United States cannot be petitioned to strike down every law which is grounded both in the general welfare of the people and religious precepts, for the very fabric of our society has interwoven moral principles of a religious origin. The Ohio statute does not force participation in any religious pursuit, and it contains an exception which clearly protects those who would conscientiously observe the seventh day of the week as their Sabbath for religious purposes. The Ohio statute clearly serves as secular a purpose and maintains the state's neutrality in religious matters, as did the transportation of school children, albeit to a Catholic school, which was upheld by the Supreme Court of the United States in *Everson v. Board of Education*, 330 U. S. 1. The Ohio statute in question is entirely dissimilar from those state statutes admittedly affecting religious freedom, the expression of religious views or religious evangelism which were held invalid in the cases of *Cantwell v. Connecticut*, 310 U. S. 296, *Murdock v. Pennsylvania*, 319 U. S. 105 and *Marsh v. Alabama*, 326 U. S. 501. The instant case is dissimilar from that of *Crown Kosher Supermarket of Massachusetts, Inc. v. Gallagher*, 176 Fed. Supp. 466, Supreme Court of the United States, October Term (1960), Docket Number 11, as the Ohio statute would except from its operations persons similar to the appellee in that case and would allow their free exercise of their religious beliefs and the normal transaction of their business.

CONCLUSION

The Supreme Court of the United States had before it on appeal the Ohio statute as effective prior to July 17, 1959, in the case of *State of Ohio v. Kidd*, 167 Ohio St., 521 358 U. S. 131, and such appeal was dismissed as there was no substantial federal question. The essence of the statute, both before and after its amendment effective July 17, 1959, remains the same, as it contains a general prohibition against common labor on Sunday and the opening of a premises for the transaction of business, and excepts from this general prohibition, works of charity and necessity, and those who conscientiously observe the seventh day of the week as the Sabbath, and refrain from doing those things prohibited on Sunday. The only remaining question as to this statute is the construction and effect of the exceptions added by amendment effective July 17, 1959 which were not specifically considered by the Court below.

It is therefore respectfully submitted that the appellants now present no substantial question for the decision of the Supreme Court of the United States and that the judgment of the Supreme Court of Ohio is on a non-federal basis; and that the appeal should be dismissed.

Respectfully submitted,

LOUIS R. YOUNG,
Director of Law,
FRANK T. PIZZA,
Assistant Director of Law,
Department of Law,
Attorneys for Appellee.